

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

GARY HUNTER,  
Appellant,  
  
v.  
  
DEPARTMENT OF THE AIR FORCE,  
Agency.

DOCKET NUMBER  
CB-7121-97-0050-A-1

DATE: JUN 17 1999

Barrie M. Shapiro, Esquire, Minahan & Shapiro, P.C., Lakewood, Colorado,  
for the appellant.

C.R. Swint, Jr., Esquire, Robins Air Force Base, Georgia, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 This case is before the Board upon an "Application For Attorney's Fees" (application for attorney fees) filed on behalf of the appellant and his union, pursuant to a July 7, 1997 arbitration award. For the reasons discussed below, the Board DENIES the application for attorney fees.

**BACKGROUND**

¶2 On January 19, 1996, the agency removed the appellant from his WG-10 Sheet Metal Mechanic (Aircraft) position for making certain threatening statements.

The appellant appealed the removal through the negotiated grievance procedure to arbitration, alleging, inter alia, discrimination based on post-traumatic stress disorder. In the July 7, 1997 arbitration award, the arbitrator found that the agency proved its charge. He further found that the appellant showed that he was mentally disabled but that neither party showed that his disability could be accommodated, and that the appellant failed to show disparate treatment based on his disability. The arbitrator ordered the agency to return the appellant to employment effective the date of his removal and to reinstate him to duty if he were found mentally fit for duty. The arbitrator found that the appellant was not entitled to back pay because he was not fit for duty at the time his removal was effected. *Hunter v. Department of the Air Force*, 77 M.S.P.R. 589, 591-92 (1998). Nevertheless, the arbitrator directed the agency to pay the appellant reasonable attorney fees, finding that "the Union was substantially the 'prevailing party' and 'interests of justice' would be served." Request for Review File, Tab 1, Arbitration Award at 59. In a March 6, 1998 final decision, the Board denied the appellant's request for review of the arbitrator's award. *Hunter*, 77 M.S.P.R. at 591-96.

¶3 Subsequently, the appellant filed a request with the Equal Employment Opportunity Commission (EEOC) for review of the Board's March 6, 1998 final decision. In an October 8, 1998 decision, EEOC concurred with the Board's final decision. *Hunter v. Peters*, EEOC No. 03980060 (Oct. 8, 1998), Request for Review File, Tab 7.

¶4 On December 9, 1998, the appellant's former attorney filed the application for attorney fees on the behalf of both the appellant and the American Federation of Government Employees, Local 987. Attorney Fee (AF) File, Tab 1.

¶5 In a December 18, 1998 acknowledgment notice, the Clerk of the Board notified the parties that, to the extent that the application for attorney fees was intended as a motion for attorney fees, it raised an issue of timeliness under

5 C.F.R. § 1201.204(d), in connection with the Board's final decision, and an issue of Board jurisdiction over a motion for attorney fees where the Board has reviewed an arbitration award. The Clerk also informed the parties that, to the extent that the application was intended as a petition for enforcement of the arbitrator's attorney fee award, it also raised an issue of timeliness under 5 C.F.R. § 1201.182(a), as well as an issue of Board jurisdiction over such a petition for enforcement. Thus, the Clerk afforded the parties an opportunity to address these issues within 35 days of the date of the acknowledgment notice. AF, Tab 2.

¶6 The agency timely responded in opposition to the application for attorney fees and also timely responded to the Clerk's acknowledgment notice, arguing that the Board lacks jurisdiction over the application for attorney fees because there is no case within the Board's appellate jurisdiction and the appellant did not prevail before the Board. The agency further contended that the application for attorney fees is untimely under the Board's regulations whether it was intended as a motion for attorney fees or a petition for enforcement. AF, Tab 3.

¶7 The appellant's former attorney timely responded to the Clerk's acknowledgment notice, contending that the application for attorney fees was timely filed because he first filed an application for a determination of the amount of attorney fees with the arbitrator on August 26, 1997, within the time limit for filing a motion for attorney fees with the Board, and diligently pursued the matter with the arbitrator. He contends that a December 21, 1998 letter from the arbitrator indicates that the arbitrator is still refusing to determine a specific amount of attorney fees because both parties had not agreed to any such amount. AF, Tab 4 at 2. The appellant's former attorney also indicated that the application for attorney fees was timely filed as a petition for enforcement of the arbitrator's July 7, 1997 decision awarding attorney fees. He stated that it was apparent that the arbitrator did not wish to address the issue of the award of attorney fees while the appellant was continuing to pursue administrative remedies but that there was

no reason for the arbitrator to continue to refuse to rule on the matter after the appellant had exhausted his administrative remedies. The appellant's former attorney stated that he brought the matter to the Board after further attempts to convince the arbitrator to rule on the attorney fees issue were futile. AF, Tab 4 at 3.

### ANALYSIS

*The Board lacks authority to consider the application for attorney fees as a motion for attorney fees.*

¶8 Under 5 U.S.C. § 7701(g) and 5 C.F.R. § 1201.202(a)(2), the Board has the authority to award attorney fees where the appellant is a prevailing party in a request for Board review of an arbitration decision under 5 U.S.C. § 7121(d). The Board must have had jurisdiction over the underlying subject matter and the appellant must have sought review of the arbitration decision. *See Robinson v. Department of Health and Human Services*, 32 M.S.P.R. 683, 686 (1987). Further, where an appellant does not prevail before an arbitrator, but prevails before the Board in a request for review of the arbitration decision, the Board has jurisdiction to award attorney fees, including attorney fees for legal services rendered before the arbitrator. *Id.*

¶9 Here, the appellant requested Board review of the arbitration decision, and the Board found that it had jurisdiction over the underlying subject matter and adjudicated it. However, while the appellant prevailed before the arbitrator, he did not prevail before the Board. *See Hunter*, 77 M.S.P.R. at 591-96. Because the appellant was not a prevailing party before the Board, the Board lacks authority to award attorney fees on behalf of the appellant and his union. *See* 5 U.S.C. § 7701(g); 5 C.F.R. § 1201.202(a)(2); *Robinson*, 32 M.S.P.R. at 686; *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 434-35 (1980).

*The Board lacks authority to enforce the arbitrator's attorney fees award.*

¶10 "Under 5 U.S.C. [§] 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions." 5 C.F.R. § 1201.181(a). Thus, in appropriate instances, "[t]he Board's decisions and orders will contain a notice of the Board's enforcement authority." *Id.* "Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction." 5 C.F.R. § 1201.182(a). However, the Board's authority to order compliance and to enforce compliance with its orders is limited to Federal agencies and employees. 5 U.S.C. § 1204(a)(2); 5 C.F.R. § 1201.181(a); *Melendez v. Puerto Rico National Guard*, 70 M.S.P.R. 252, 253-54 (1996), *review dismissed*, 152 F.3d 943 (Fed. Cir. 1998) (Table).

¶11 In the present case, as previously noted, the Board's March 6, 1998 decision was a final decision. *See Hunter*, 77 M.S.P.R. at 596. Because, however, the Board denied the appellant's request for review of the arbitration decision, there was no Board order with which the agency was directed to comply. *See id.* at 596-98. Thus, there is now no compliance order to enforce against the agency. *See* 5 U.S.C. § 1204(a)(2); 5 C.F.R. § 1201.181(a); *cf. Belldina v. Department of Justice*, 50 M.S.P.R. 497, 502-03 (1991), and *Robinson v. Department of Health and Human Services*, 30 M.S.P.R. 389, 399 (when the Board, in adjudicating a request for review of an arbitration decision, substantially modifies or reverses the arbitration decision, it orders compliance by the parties only, and not the arbitrator, and provides for enforcement of such compliance), *recons. denied*, 31 M.S.P.R. 479 (1986). Because the Board's enforcement authority is limited to Federal agencies and employees, the Board lacks enforcement authority over the arbitrator's award of attorney fees. Because we find that the Board lacks authority to award attorney fees or to entertain a petition for enforcement in this case, we

need not reach the issue of the timeliness of the appellant's application for attorney fees.

ORDER

¶12 This is the final order of the Merit Systems Protection Board in this case.  
5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING  
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.